आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ,चण्डीगढ़

IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, "A", CHANDIGARH

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER &
SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

आयकरअपीलसं./**ITA No.903 /CHD/2019**

निर्धारण वर्ष / Assessment Year :2007-08

The Assistant Excise & Taxation Commissioner, Nahan	बनाम	The Additional CIT, TDS Range, Shimla
स्थायीलेखासं./PAN/TAN NO: PTLA12468B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकरअपीलसं./**ITA No. 904 /CHD/2019**

निर्धारण वर्ष / Assessment Year :2008-09

The Assistant Excise & Taxation Commissioner, Nahan	बनाम	The Additional CIT, TDS Range, Shimla
स्थायीलेखासं./PAN/TAN NO: PTLA12468B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकरअपीलसं./**ITA No. 905 /CHD/2019**

निर्धारण वर्ष / Assessment Year :2007-08

The Dy. Commissioner of State Taxes and Excise, Shimla (H.P.)	बनाम	The Additional CIT, TDS Range, Shimla
स्थायीलेखासं./PAN/TAN NO: PTLS11731G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकरअपीलसं./**ITA No. 906 /CHD/2019**

निर्धारण वर्ष / Assessment Year :2008-09

The Assistant Excise & Taxation Commissioner, Nahan	बनाम	The Additional CIT, TDS Range, Shimla
स्थायीलेखासं./PAN/TAN NO: PTLS11731G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारितीकीओरसे/Assessee by : Sh.Harry Rikhy, Advocate
राजस्वकीओरसे/ Revenue by : Smt. AmanpreetKaur, Sr. DR

सुनवाईकीतारीख/Date of Hearing : 23.11.2022
उदघोषणाकीतारीख/Date of Pronouncement : 07.12.2022

आदेश/Order

PER BENCH:

These are four appeals filed by the aforesaid assessees against the respective orders of the CIT(A), Palampur for assessment years 2007-08 and 2008-09 as per following details:-

S.No.	ITA Number	CIT(A) order / dated
1	903/Chd/2019	CIT(A) Palampur, dated 19.12.2018
2	904/Chd/2019	CIT(A) Palampur, dated 19.12.2018
3	905/Chd/2019	CIT(A) Palampur, dated 19.12.2018
4	906/Chd/2019	CIT(A) Palampur, dated 19.12.2018

2. At the outset, it is noted that there is a delay in filing the present appeals. After hearing both the parties and considering the material available on record, we find that there was reasonable cause for the delayed filing of the present appeals and the delay so happened is hereby condoned and all these appeals are admitted for adjudication.

3. Since common issue relating to levy of penalty u/s 271CA is involved, all these appeals were heard together and are being disposed off by this consolidated order. With the consent of both the parties, the appeal filed by the assessee in ITA No. 903/Chd/2019 was taken as a lead case, wherein the assessee has taken following grounds of appeal:-

> "1. *That the order of the Ld. CIT(A,) Shimla is defective both in law and facts of the case.*
>
> *2. That the Ld. CIT(A), Palampur is unjustified in upholding the penalty of Rs. 95,078/- levied by the Ld. Assessing Officer u/s 271CA of the Income Tax Act, 1961. This penalty is uncalled for and deserves to be deleted."*

4. Briefly, the facts of the case are that a survey u/s 133A of the Income Tax Act, 1961 (hereinafter called 'the Act') was carried out on 24.4.2008 and during the survey, it was noticed that the assessee has not collected TCS in respect of Toll Tax Barriers as per provisions of Section 206(1C) of the Act. Thereafter, after issuing a show cause to the assessee, the AO passed an order u/s 206C(6A) of the Act dated 29.5.2008 raising a demand of Rs.1,27,487/- consisting of TCS of Rs 95078/- and interest of Rs 32409/-.

4.1 Being aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A). The Ld. CIT(A) vide his order dated 15.5.2019 directed the AO to verify the claim of the

assessee with regard to the payment of TCS by the person from whom such tax was to be collected. The ITO (TDS), Nahan in compliance to the directions of the Ld. CIT(A) provided due opportunity to the assessee, however, the same was not availed by the assessee and thereafter, the AO passed the appeal effect order on 22.3.2010 without giving any relief to the assessee. The assessee thereafter went in further appeal before the Tribunal and the Coordinate Bench has confirmed the order of the AO vide its order dated 18.6.2010 in ITA Nos. 353 to 356/Chd/2010.

4.2 Separately, ITO Shimla vide its letter dated 31.7.2008 referred the matter relating to levy of the penalty u/s 271CA to the Additional CIT TDS Range, Shimla who issued a show cause dated 3.9.2008 and thereafter, again another show-cause was issued on1.4.2010. As per the order of the Addl. CIT, TDS Range Shimla, no reasonable cause / explanation for non-collection of TCS had been furnished by the assessee and even where the assessee is in appeal before the Tribunal, it was held that there is no bar in levying the penalty and given that the assessee has failed to collect tax at source in terms of section 206(1C) of the Act and the fact that the provisions of section 271CA have been inserted by the Finance Act 2006 w.e.f. 1.4.2007, it was held that the

assessee was in default for non-collection of Tax at Source and accordingly, he levied penalty of Rs. 95,078/- equal to the amount of tax which the assessee failed to collect at source.

4.3 Being aggrieved, the assessee carried the matter in appeal beforethe Ld. CIT(A),Palampur, Himachal Pradesh and the submission made before the lower authorities were reiterated. It was further submitted that the assessee has since moved an appeal before the Hon'ble High Court of Himachal Pradesh against the order of the Tribunal confirming its liability to collect TCS and the Hon'ble High Court vide its order passed in ITA 36/10 dated 12.11.2010 has admitted the assessee's appeal.

4.4 As per the Ld. CIT(A), there is no dispute with regard to the applicability of provisions of section 206C of the Act. It is also admitted by the assessee that the issue has already been decided in preceding years against the assessee and appeal for which is pending before the Hon'ble High Court. Thereafter, referring to the provisions of section 206C of the Act as well as section271CA of the Act, it was held that the Addl. CIT was justified in imposing penalty u/s 271CA of the Act on account of failure to collect Tax at Source. Against

the said findings and order of the Ld. CIT(A), the assessee is now in appeal before us.

5. During the course of hearing the Ld. AR submitted that the assessee was under a bonafide belief that provisions of section 206C(IC) are not applicable as the provisions uses the phrase "Toll Plaza" whereas the assessee had granted the contract for running a Toll Barrier to certain entities to collect entry tax from the vehicles entering the state of the Himachal Pradesh. It was further submitted that though the assessee's submissions didn't find favour with the Tribunal, the assessee has since moved an appeal before the Hon'ble High Court which has admitted the assessee's appeal for adjudicating substantial grounds of appeal which itself supports the bonafides of the assessee and the fact that the matter is debatable in which cases, the penalty cannot be levied. He has further relied upon the written submissions which read as under:-

> *"1) That the appellant is a Government Department in the State of Himachal Pradesh which allots the Toll Tax Barriers at the entry points of Nahan and Shimla to the eligible persons/Lessees. The section 3 A of the Himachal Pradesh Tolls Act, 1975 empowers the Excise and Taxation Commissioner, Himachal Pradesh to determine the terms and conditions, subject to approval of State Government, for collection of toll levied under section 3 of the Act to be granted to respective in-charge of circle i.e. Assistant Excise & Taxation Commissioner (AETC)*

of each District of Himachal Pradesh (Himachal Pradesh Tolls Act, 1975 - Annex. 1).

2) That a Survey was conducted on the offices of the appellant by the TDS wing of Income Tax Department in early 2008 and it was brought to the notice of the appellant for the first time that they have to Collect the Tax at Source (TCS) as per the provisions of Section 206C(1C) of the Income Tax Act, 1961 from the Lessee to whom the contract was granted for the collection of Toll Tax at the entry point barriers of the State of Himachal Pradesh.

3) That before the Survey the appellant was never directed or guided properly by the Higher Authorities as the matter of collection of TCS was always controversial in the whole State of Himachal Pradesh in the earlier years.

4) That the appellant was under bona fide belief that the provisions of Section 206C(1C) of the Income Tax Act, 1961 are not applicable in their case due to the following reasons:-

a) That the section 206C(1C) mentions the 'term Plaza'' and the appellant has granted the contract for running a Toll Barrier to collect entry tax from the vehicle entering the State of Himachal Pardesh and there is no plaza attached to the same.

b) That the Lessees have already paid the Income Tax in their respective Income Tax Returns on the profits earned out of these lease contracts so there is no need to collect the TCS again from the Lessees.

c) That collection of toll by lessee of the person employed by him on behalf of the Govt, under HP Tolls Act, 1975 is only delegation of collection of tax levied under authority of State and the same does not

fall within ambit of Section 206C(1C) of the I.T. Act, 1961.

d) *That delegation of function of collection of toll under section 3 -A of HP Tolls Act, 1975 is clothed with statutory authority and is not a business as defined under section 2(13) of the Income Tax Act. 1961.*

e) *That collection of Toll under HP Tolls Act, 1975 is not a Toll Plaza under section 206C(IC) of the Income Tax Act, 1961.*

f) *That the collection of toll under HP Toll Act, 1975 has been levied under Entry 59 of List-II of Seventh Schedule to the constitution of India irrespective of whether collected by the Govt, machinery or other agents of the Govt, levy remains as income of the State exempted from Union Taxation by virtue of Article 289(1) of the Constitution.*

g) *That Income Tax, if any, is to be assessed on the income of the toll lessees and not on the tax collection of the State and for which the State is not responsible in any manner.*

5) That the appellant did not Collect any Tax at Source (TCS) under the above said bona fide beliefs and grounds which have been disputed before the Appellate Authorities. The above said legal grounds have duly been admitted by the Hon'ble Himachal Pradesh High Court which is still pending till date. The appeal numbers in the case of Assistant Excise and Taxation Commissioner, Nahan and Shimla are ITA No. 36/2010 and ITA No. 14/2011 respectively which have been connected with the lead case of Assistant Excise and Taxation Commissioner, Bilaspur (ITA No. 56&58/2009). In all these connected cases the Hon'ble High Court has stayed the proceedings of the Income Tax Department till

the disposal of the appeal (Paper Book page nos. 25-30). Hence, the penalty levied u/s 271CA of the I.T. Act, 1961 in a sub-judice and debatable matter which has been admitted and stayed by the Hon'ble Himachal Pradesh High Court is bad in law which deserves to be deleted.

6) That the penalty levied u/s 271CA on the appellant is duly covered by the provisions of section 273B of the I.T. Act, 1961 and the appellant duly had a genuine reasonable cause as explained above for not collecting the Tax at Source (TCS). Moreover, the admission of the appeal by the Hon'ble Himachal Pradesh High Court also supports the bona fide of the appellant that the issue is debatable.

7) That the appellant being a Government Department is a bona fide person which has not done the act deliberately with any mala fide intention.

8) That as soon as it came to the knowledge of the appellant, through the order of the Income Tax Department, the TCS along with the interest was deposited and there is no loss to the Revenue."

5.1. Further, our attention was drawn to the decision of the Hon'ble Supreme Court in the case of CIT Vs. Eli Lilly & Co. India (P) Ltd & Ors 312 ITR 225, wherein at para 35, the Hon'ble Supreme Court has laid down the following proposition:-

"35. Sec. 271C inter alia states that if any person fails to deduct the whole or any part of the tax as required by the provisions of Chapter XVII-B then such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct. In

these cases we are concerned with s. 271C(l)(a). Thus s. 271C(l)(a) makes it clear that the penalty leviable shall be equal to the amount of tax which such person failed to deduct. We cannot hold this provision to be mandatory or compensatory or automatic because under s. 273B Parliament has enacted that penalty shall not be imposed in cases falling thereunder. Sec. 271C falls in the category of such cases. Sec. 273B states that notwithstanding anything contained in s. 271C, no penalty shall be imposed on the person or the assessee for failure to deduct tax at source if such person or the assessee proves that there was a reasonable cause for the said failure. Therefore, the liability to levy of penalty can be fastened only on the person who do not have good and sufficient reason for not deducting tax at source. Only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the person to prove such good and sufficient reason. In each of the 104 cases before us, we find that non-deduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the head "Salaries" being exigible to deduction of tax at source under s. 192 was a nascent issue. It has not been considered by this Court before. Further, in most of these cases, the tax- deductor-assessee has not claimed deduction under s. 40(a)(iii) in computation of its business income. This is one more reason for not imposing penalty under s. 271C because by not claiming deduction under s. 40(a)(iii), in some cases, higher corporate tax has been paid to the extent of Rs. 906.52 lacs [see Civil Appeal No. 1778 of 2006 entitled CIT vs. The Bank of Tokyo-Mitsubishi Ltd.]. In some of the cases, it is undisputed that each of the expatriate employees have paid directly the taxes due on the foreign salary by way of advance tax/self-assessment tax. The tax-deductor-assessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company/HO and, consequently, we

are of the view that in none of the 104 cases penalty was leviable under s. 271C as the respondent in each case has discharged its burden of showing reasonable cause for failure to deduct tax at source.//

5.2. Further, reference was drawn to the Coordinate Bench decision in the case of Punjab State Electricity Board Vs. ITO (Chandigarh Bench – 88 TTJ 450) where at para 23, it was held as under:-

"23. The learned CIT(A) while cancelling penalty under s. 271C has held that the assessee bona fidely believed that it was not liable to deduct surcharge from the interest paid on Bonds. It has further been held that the assessee could have derived no benefit by not deducting surcharge at source as the amount was to be deducted and paid out of interest paid to the third party. Whether a belief of a person is bona fide or not is a question of fact. The CIT(A) having regard to material available on record has accepted the plea of the assessee. The Revenue has not brought any material on record to show that the belief of the assessee was not a bona fide one or that failure to deduct surcharge was attributable to gross and wilful neglect on the part of the assessee. On the facts and in the circumstances of the case, we are unable to hold that the learned CIT(A) committed any error in cancelling the penalties levied on the assessee under s. 271C of the IT Act. A reasonable belief that one is not obliged to deduct tax or surcharge at source can be treated as good and sufficient cause for not deducting tax/surcharge at source there is nothing on record to show that belief in the present case was not bona fidely held or that it was mala fide. Accordingly, we hold that the

CIT(A) was fully justified in cancelling penalty levied on the assessee."

5.3. Further, reference was drawn to the case of ADIT(TDS) Vs. District Education Officer (Delhi Bench – 36 CCH 336) where at para 7, the Coordinate Delhi Benches had held as under:-

"7. We have heard the submissions and perused the material available on record. On a consideration of the same, we are of the view that in the case of the assessee i.e. Uttarakhand Educational Department them was bona fide belief under which the assessee operated that it was not required to deduct TDS. The assessee has claimed that adequately qualified staff namely F&A Officer was not available at the relevant point of time; the assessee has also contended that as the assessee was under a bona fide belief that since it had no authority to withhold the funds received from the U.P. Government i.e. UP RajkiyaNirman Nigam Ltd. after due approvals for the Executing Authority as per the contract to which the assessee was not even a signatory there was nothing more to be done except to release the funds in favour of the contractor i.e the "Executing Agency". The explanation of the assessee that it believed that it had no choice but to transfer the funds received in its account and that it had no control over the executing agency to detain its payments has rightly been held as a reasonable cause as the bona fide belief is borne out from the fact that as soon as the said fact was pointed out to the assessee, the position was corrected. Accordingly in the afore-mentioned peculiar facts and circumstances of the case, we are of the view that the judgements relied upon by the CIT(A) fully support the stand taken. Accordingly being satisfied with the reasoning and finding arrived at in the impugned order, the department's ground is dismissed."

5.4. Further, reference was drawn to the case of Senior Accounts Officer, Thermal Power Project Anpara Vs. ACIT (Allahabad Bench – 66 TTJ 141),wherein Coordinate Allahabad Benches at para 4 to 4.1 has held as under:-

> *"4.1 Advertising to the facts of the present case, from the very beginning the explanation of the person responsible for making payment was that he did not consider the agreement with M/s IRCON to be in the nature of a contract agreement requiring deduction of tax at source from the payment made to them. In this connection, it has been repeatedly submitted that payments to M/s IRCON were made right from the year 1980 but no default on the part of the assessee was pointed out by the IT Department. This fact has not been rebutted in any manner by any of the authorities below. It can, therefore, be held that the breach flew from a bona fide belief that the assessee was not liable to act in the manner prescribed by the statute. The law does not prescribe any particular mode by which the burden placed on the assessee for showing the existence of a reasonable cause could be discharged by him. It all depends on the facts and circumstances of each case. It is open to an assessee to give a positive explanation and to adduce evidence to substantiate it or without producing any evidence to establish it from the facts on record. It can-not be accepted as a good proposition of law that the statement of an assessee should never be accepted as a good explanation. Even at the cost of repetition, we would point out that the assessee in this case had offered an explanation and that explanation could not be said not to be bona*

fide. It has to be borne in mind that penalty proceedings are quasi-criminal proceedings and as has been elaborated by the Hon'ble Supreme Court in the case of Hindustan Steel Ltd. vs. State of Orissa (1972) 83 ITR 26 (SC) penalty will not be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority concerned to be exercised judiciously and on a consideration of all the relevant circumstances.

4.2. On a careful consideration of the facts and circumstances of the case in its entirety and in view of the foregoing, we are of the considered opinion that the failure of the assessee in this case to deduct tax at source from the payments made to M/s IRCON could not be said to be without any reasonable cause. Therefore, no penalty is exigible under s. 271C of the Act. The orders of the authorities below are set aside."

5.5. Further, reference was drawn to Cental Bank of India Vs. JCIT (Ahmedabad Bench – 37 CCH 146), wherein the Coordinate Ahmedabad Benches in para 5 has held as under:-

"5. After hearing both the sides, our humble understanding is that the word "reasonable cause" can be interpreted as applied to a person having an ordinary prudence. Therefore, the expression "reasonable" gives an impression that prima facie, if a person of average intelligence has acted and under those circumstances the said action was at that point of time not infringed the settled law

then it can be reasonably held that the assessee was prevented by a "reasonable cause" under those circumstances not to act as prescribed or determined by a case law subsequently. Although ignorance of law is not an excuse but side by side it is also not expected that every tax payer should be aware about the latest development of tax law; which are otherwise fast changing. We, therefore, deem it justifiable to hold that in a situation when an assessee was not aware about the latest position of law during the assessment years under consideration; hence, he was prevented by a reasonable cause not to deduct the TDS, therefore, as far as the question of levy of penalty is concerned, entitled for the relief. Assigning this reason, we hereby direct to delete the penalty. Grounds allowed for all the years under appeal."

5.6. Further, reference was drawn to State Bank of India Vs. ADIT (Bangalore Bench – 58 CCH 435), wherein at para 14, the Coordinate Bangalore Benches has held as under:-

"14. We have carefully considered the rival submissions. The facts of the case of the Assessee in these appeals is identical to the case decided by the Jaipur Bench of ITAT in the case of State Bank of India (supra) and therefore the ratio laid down therein will squarely apply to the facts of the Assessee's case and therefore following the ratio laid down therein, the penalty imposed is liable to be cancelled. The Hon'ble Karnataka High Court in the case of Ankita Electronics Pvt. Ltd. (supra), had an occasion to deal with issue whether penalty can be levied when

quantum proceedings are pending in the Hon'ble High Court and substantial question of law is framed for consideration by the High court on the default which is the basis for initiating penalty proceedings. The Hon'ble Court held that when the additions in respect of which penalty under Section 271(l)(c) of the Act was levied, are challenged in appeal before High Court and when High Court has admitted for consideration the correctness of such addition then it means that the additions made were debatable and would lead credence to the bonafides of the assessee and in such circumstances imposition of penalty was not proper and was rightly deleted by the Tribunal. In the light of the aforesaid decision of the Hon'ble Karnataka High Court, we are of the view that levy of penalty u/s.271C of the Act, in the given facts and circumstances of the case, cannot be sustained and the same is directed to be deleted.

5.7. Similarly, reference was drawn to the case of Syndicate Bank Vs. ACIT (TDS) (Bangalore Bench 56 CCH 393), where the Bangalore Benches of the Tribunal at para 13 & 14 has held as under:-

"13. We have carefully considered the rival submissions. It is undisputed that as against the order of the Tribunal holding the Assessee to be in default for non deduction of tax at source, the Assessee has preferred appeal before the Hon'ble Karnataka High Court and the question whether the Assessee is guilty of non deduction of tax at source or not is to be decided in such appellate proceedings. In this background of facts, the question is whether penalty can be imposed on the Assessee u/s.271C of the Act. The Hon'ble

Karnataka High Court in the case of Ankita Electronics Pvt.Ltd. (supra) had an occasion to deal with identical issue and the Court held as follows:-

> *"6. While dismissing the appeal, the Tribunal has observed that the additions in respect of which penalty under Section 271(l)(c) of the Act was levied, have been admitted by the High Court for consideration and thus found that the additions made were debatable and would lead credence to the bona fides of the assessee. It thus held that the matter of imposing penalty under Section 271(1)(c) of the Act, was not exigible in the case on hand.*
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> *7. The Tribunal placed reliance on decision of the ITAT, Mumbai in the case of Nay an Builders & Developers (P.) Ltd. v. ITO [IT Appeal No. 23 79/Mum/2009, dated 18-3-2011], which had also held that "the admission of substantial questions of law by the High Court lends credence to the bona fides of the assessee in claiming deduction. Once it turns out that the claim of the assessee could have been considered for deduction as per a person properly instructed in law and is not completely debarred at all, the mere fact of confirmation of disallowance would not per se lead to the imposition ofpenalty."*
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> *8. The assessee in the present case had disclosed ail the materials on which it was claiming deduction. The matter as to whether the deduction was to be given or not, was taken up by the revenue authorities and it was held that certain deductions claimed by the assessee were to be disallowed. It is not disputed that the questions regarding the disallowance of the deductions claimed by*

the assessee is under consideration by the High Court, as the appeal filed by the assessee has been admitted, on the substantial questions of law which have been reproduced hereinabove.

9. The mere admission of the appeal by the High Court on the substantial questions of law as have been quoted above, would make it apparent that the additions made were debatable. The Tribunal has thus rightly held that the admission of substantial questions of law by the High Cour1- leads credence to the bona fide of the assessee and therefore, the penalty is not exigible under Section 271(l)(c) of the Act. Merely because the claim of the assessee has been rejected by the revenue authorities would not make 'he assessee liable for penalty."

14. In the light of the aforesaid decision of the Hon'ble Karnataka High Court, we are of the view that levy of penalty u/s.271C of the Act, in the given facts and circumstances of the case, cannot be sustained and the same is directed to bedeleted".

5.8. It was submitted that in the case of State Bank of India Vs. ADIT as well as Syndicate Bank Vs. ACIT (TDS) (supra), the Coordinate Bangalore Benches have relied upon the decision of the Hon'ble Karnataka High Court in the case of Ankita Electronics Pvt. Ltd 379 ITR 50 (Kar), wherein, it was held that the admission of substantial question of law by the High Court lends credence to the bona fides of the assessee in his action and hence no penalty can be imposed on such additions. Further, reliance was placed on the decision of

Hon'ble Delhi High Court in the case of PCIT Vs. M/s Harsh International Pvt. Ltd. *(ITA No. 620/2019 & CM Appl. 301811/2019 & 622/2019 & CM Appl 30813/2019 dated 22.12.2020)* where the Hon'ble Delhi High Court has laid down a similar proposition and the relevant findings of the Hon'ble Delhi High Court are contained in para 9 - 12 of its order which reads as under-

> *"9. Having heard the learned counsel for the appellant and having perused the impugned order, this Court is of the view that the ITAT was right in deleting the penalty levied under Section 271(1)(c) of the Act. It has to be noted that penalty proceedings are an outcome of assessment and if the assessment itself is debatable, the penalty proceedings cannot survive.*
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> *10. This court is also of the opinion that levy of penalty cannot be a matter of course, as sought to be contended by the Revenue. It can only be levied in cases where the concealment of income has been proven. If the quantum order itself has been challenged and this Court has framed substantial questions of law in the appeal preferred by the respondent- assessee, it shows that the alleged concealment is not final and the issue is disputable. Consequently, the penalty levied by the assessing officer cannot survive in such a case.*
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> *11. It is pertinent to note that this Court in similar cases [CIT Vs. Liquid Investment Ltd, ITA 240/2009, CIT Vs H B Leasing & Finance Co. Ltd. I.T.A. No. 1612/2010 and CIT Vs. Thomson Press India Ltd, ITA 426,440/2013] has upheld the deletion of the penalty on the same ground i.e. the fact that appeals were admitted proved that the issue was debatable. The relevant portion of the orders in CIT Vs. Liquid*

Investment Ltd (supra) and CIT Vs. Thomson Press India Ltd(supra) is reproduced herein below:-

A) Order dated 5th October, 2010 passed by this Court in CIT Vs. Liquid Investment Ltd (supra) :-

> *" Both the CIT(A) as well as the ITAT have set aside the penalty imposed by the Assessing Officer under Section 271(1)(c) of the Income Tax Act, 1961 on the ground that the issue of deduction under Section 14A of the Act was a debatable issue. We may also note that against the quantum assessment where under deduction under Section 14A of the Act was prescribed to the assessee, the assessee has preferred an appeal in this Court under Section 260A of the Act which has also been admitted and substantial question of law framed. This itself shows that the issue is debatable. For these reasons, we are of the opinion that no question of law arises in the present case."*

B) Order dated 3rd March, 2014 passed by this Court in CIT Vs. Thomson Press India Ltd(supra) :-

> *" This Court is of the opinion that where the question of law as raised by the assessee has been framed and admitted in the circumstances of this case, imposition of penalty cannot be justified. The appeals being bereft of substantial question of law are dismissed."*

12. Keeping in view the aforesaid, this Court finds that no question of law arises in the present appeals for consideration of this Court."

5.9. It was accordingly submitted in the light of the light of the aforesaidfacts and circumstances of the case and keeping

in view the legal position so laid down by various Coordinate Benches of the Tribunal as well as by the Hon'ble High Courts, the penalty levied u/s 271CA of the Act may be directed to be deleted.

6. Per contra, the Ld. DR has relied on the orders of the lower authorities and it was submitted that the quantum additions have since been confirmed by the Tribunal and reliance was drawn to the relevant findings of the Tribunal which are contained in paras 15 and 16 of the order dated 28.6.2010, the contents thereof read as under;-

> *"15. The issue in ground No.3 is against the applicability of the provisions of section 206C (6A) of the Act which has been inserted by Finance Act, 2006 w.e.f. Assessment Year 2007-08. Identical issue arose before the Tribunal in the aforesaid case (supra) and the Tribunal vide order dated 28.5.2009, held as under:-*
>
> > *"12. The second plea raised by the assessee is that the Assessing Officer has passed his order for the captioned years u/s 206C(6A) of the Act, which was introduced by the Finance Act 2006 w.e.f. 1.4.2007 and, therefore, the impugned order passed for the financial years 2004-05 to 2006-07 are without jurisdiction. It is submitted that the assessee has been held to be an assessee in default in terms of section 206C(6A) of the Act for the Financial Year during the period when section 206C(6a) was not on the statute.*

Therefore, the levy has to fail for such financial years from 2004-05 to 2006-07.

13. On the other hand, the learned D.R. has pointed out that section 206C(IC) was introduced w.e.f. 1.10.2004 providing for collection of taxes at source on grant of lease/licence of toll plaza and such a provision covers all the years under consideration. The order passed by the Assessing Officer is valid in as much as the default committed by the assessee was for an action provided in section 206C(IC) of the Act which was on the Statute during the relevant period.

14. We have considered the rival submissions carefully. In the context of the present controversy, we have carefully perused the provisions of section 206C(IC) inserted by the Finance (No.2) Act, 2004 w.e.f. 1.10.2004. Section 206C(IC) provides for collection of the requisite tax at the time of debiting of the amount payable by the licensee or lessee to the account of the licensee or lessee or at the time of receipt of such amount from the licensee or lessee. Section 206C(2) provides for power to recover tax by collection under sub-section (1C) of section 206C of the Act inserted w.e.f. 1.10.2004. Similarly, sub-section (6A) of section 206C of the Act has been inserted w.e.f. 1.4.2007, which provides that if any person responsible for collecting the whole or part of the tax or after collecting, fails to pay the tax, as required by or under this Act, he

shall be deemed to be an assessee in default in respect of such tax. In the case set up by the assessee, sub-section (6A) of section 206C of the Act has been put on the Statute w.e.f. 1.4.2007 and, therefore, prior to such date, the assessee cannot be held to be an assessee in default if it does not collect the tax in accordance with the provisions of section 206C of the Act. In our view, the responsibility of collecting the tax at source is provided in terms of section 206C(IC) of the Act, which has been inserted by the Finance (No.2) Act 2004 w.e.f. 1.10.2004. Section 206C (6A), in our view, is not the charging section so as to defeat the provisions of section 206C(IC) for the period starting from 1.10.2004 up to 31.3.2007. The Assessing Officer has passed the impugned order on 30.6.2008 and ostensibly at that time, section 206C(6A) was on the statute. Notably, there is no plea that the order passed on 30.6.2008 was barred by limitation vis-à-vis the Financial Years under consideration Therefore, the plea raised by the assessee with regard to the applicability of section 206C(6A) for the impugned Financial Years has to fail, especially when the applicability of section 206C(1C) for the impugned years is not disputed.

16. Respectfully following the aforesaid ratio laid down by the Tribunal in the case of Asstt. Excise & Taxation Commissioner, Bilaspur&Una H.P. Vs. ITO (TDS), Palampur (supra), we uphold the application of section 206C(6A) of the Act for the impugned financial year in view of the applicability of section 206C(IC) of the

Act for the impugned years being not disputed. Ground No.3 raised by the assessee is thus dismissed.

6.1 It was further submitted that the law is very clear that the assessee was supposed to collect TCS as upheld by the Tribunal and no reasonable cause has been shown for non-deduction of TCS. It was accordingly submitted that there is no infirminity in the order of the ld CIT(A) who has since confirmed the levy of penalty u/s 271CA of the Act.

7. We have heard the rival contentions and perused the material available on record. The Hon'ble Karnataka High Court in the case of Ankita Electronics Pvt. Ltd. *(Supra*) had held that when the additions in respect of which penalty under Section 271(l)(c) of the Act was levied, are challenged in appeal before High Court and when High Court has admitted for consideration the correctness of such addition then it means that the additions made were debatable and would lead credence to the bonafides of the assessee and in such circumstances imposition of penalty was not proper and was rightly deleted by the Tribunal. Similarly, the Hon'ble Delhi High Court in case of M/s Marsh International Pvt Ltd *(Supra)* has held that penalty proceedings are an outcome of assessment and if the assessment itself is debatable, the penalty proceedings cannot survive. It was

held that where the quantum order itself has been challenged and this Court has framed substantial questions of law in the appeal preferred by the respondent- assessee, it shows that the alleged concealment is not final and the issue is disputable and the penalty levied by the assessing officer cannot survive in such a case and has upheld the order of the Tribunal deleting the penalty.

8. In the instant case, it is an admitted position that the Hon'ble Himachal Pradesh High Court has admitted the following substantial question of law in assessee's own case as under:-

> *"Admit the following question of law:-*
>
> 1. *That collection of toll by lessee, of the person employed by him on behalf of the Govt, under HP Tolls Act, 1975 is only delegation of collection of tax levied under authority of State and the same does not fall within ambit of Section 206C (IC) of the Income Tax Act, 1961.*
> 2. *That delegation of function of collection of toll under Section 3-A of HP Tolls Act, 1975 is clothed with statutory authority and is not a business as defined under Section 2(13) of the Income-tax Act, 1961.*
> 3. *That collection of Toll under HP Tolls Act, 1975 is not a toll plaza under Section 206C (IC) of the Income Tax Act, 1961.*

4. *The collection of toll under HP Tolls Act, 1975 has been levied under Entry 59 of List-II of Seventh Schedule to the constitution of India irrespective of whether collected by the Govt, machinery or other agents of the Govt, levy remains as income of the State exempted from Union Taxation by virtue of Article 289(1) of the Constitution.*
5. *The Income-tax, if any, is to be assessed on the income of the toll lessess and not on the tax collection of the State and for which the State is not responsible in any manner."*

9. In the given facts and circumstances of the case where the substantial questions of law relating to applicability of section 206C(IC) of the Act have been admitted by the Hon'ble Himachal Pradesh High Court, in the light of the aforesaid decisions of the Hon'ble Karnataka High Court as well as Hon'ble Delhi High Court and respectfully following the same, we are of the view that levy of penalty u/s.271CA of the Act cannot be sustained and the same is directed to be deleted.

ITA No. 904-906/CHAD/2019

10. Both the parties fairly submitted that the facts and circumstances in other three cases are exactly identical and similar contentions as advanced in case of ITA No. 903/CHAD/2019 may be considered. Following the aforesaid

discussions, the penalty levied u/s 271CA in these three cases are also directed to be deleted.

11. In the result, all four appeals filed by the assessee are allowed.

Order pronounced in the Open Court on 07/12/2022.

Sd/-
(DIVA SINGH)
Judicial Member

Sd/-
(VIKRAM SINGH YADAV)
Accountant Member

Dated : 07/12/2022
"आर.के."

आदेशकीप्रतिलिपिअग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त/ CIT
4. आयकरआयुक्त (अपील)/ The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयआधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्डफाईल/ Guard File

आदेशानुसार/ By order,
सहायकपंजीकार/ Assistant Registrar